

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISAAC ANTOINE HILL,

Defendant-Appellant.

UNPUBLISHED

December 22, 2020

No. 351799

Oakland Circuit Court

LC No. 2019-269904-FH

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault by strangulation or suffocation, MCL 750.84(1)(b), and assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 12 to 75 years’ imprisonment for the assault by strangulation or suffocation conviction and 9 to 15 years’ imprisonment for the felonious assault conviction. We affirm.

I. FACTUAL BACKGROUND

Defendant was arrested following a physical altercation in which he strangled the victim, who was his girlfriend. After the victim attempted to end her romantic relationship with defendant, defendant pushed the victim against a wall and squeezed her neck for approximately one minute. Defendant let go of the victim’s neck for a short period. However, defendant pushed the victim against a wall and squeezed her neck a second time after she attempted to flee. On both occasions, the victim experienced visual disturbances and believed that she was going to lose consciousness.

At trial, a jury found defendant guilty as noted *supra*. A presentence investigation report (PSIR) was prepared, and the PSIR indicated that the minimum sentencing guidelines range calculated for the assault by strangulation or suffocation conviction was 29 to 114 months’ imprisonment. At the sentencing hearing, the trial court sentenced defendant, above the guidelines, to 12 to 75 years’ imprisonment for the assault by strangulation or suffocation conviction and 9 to 15 years’ imprisonment for the felonious assault conviction. When deciding to upwardly depart from the minimum sentencing guidelines range, the trial court stated:

I find that is a reasonable, slight upward deviation in light of the following circumstances. First, he strangled his victim twice. Second, there were children in the home. Third, this was not an isolated incident, like a smack, or a hit, and then leave.

But as [t]he trial showed and as the prosecutor pointed out, this was a long extenuating set of circumstances. And fourth, although there was no medical treatment necessary, I've ruled in favor of the defendant in connection with that. I do find that the -- that undercounts the amount of psychological and physical harm that actually occurred in the case, and that ought to be accounted for.

This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues on appeal that the evidence presented by the prosecution at trial failed to establish beyond a reasonable doubt that defendant committed the crime of assault by strangulation or suffocation. We disagree.

“This Court reviews de novo a defendant’s challenge to the sufficiency of the evidence supporting his or her conviction.” *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019) (citation omitted). This Court reviews the evidence “in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the crime’s elements beyond a reasonable doubt.” *Id.* (citation omitted). “Conflicting evidence and disputed facts are to be resolved by the trier of fact.” *Id.* (citation omitted). “Minimal circumstantial evidence and reasonable inferences can sufficiently prove the defendant’s state of mind, knowledge, or intent.” *Id.* (citation omitted).

MCL 750.84(1)(b) provides that any individual who assaults another person by strangulation or suffocation is guilty of a felony. This Court has defined an assault as “an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011) (citation and quotation marks omitted). A battery is “an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.” *Id.* (citation and quotation marks omitted). Strangulation or suffocation is defined under MCL 750.84(2) as “intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.”

At trial, the victim testified that defendant grabbed her, pushed her against a wall, and squeezed her neck on two separate occasions. On both occasions, the victim experienced visual disturbances and she believed that she was going to lose consciousness. As defendant squeezed the victim’s neck, defendant told her that he was going to kill her. The victim’s testimony was corroborated by the audio recording of her 911 call in which the victim can be heard coughing and breathing heavily. During the 911 call, the victim told the operator that defendant choked her. The victim’s testimony was further corroborated by Deputy Nathaniel Rogers, a deputy employed by the Oakland County Sheriff’s Office, who testified that he noticed red marks on the victim’s neck when he arrived at her home. Additionally, photographs admitted at trial showed that the

victim had red marks on her neck. Further, the prosecution's expert witness, Diane Zalecki-Bertalan, reviewed the audio recording of the victim's 911 call, the Emergency Medical Services (EMS) report, the police report, and photographs of the victim's neck, and opined that the victim experienced symptoms that were consistent with strangulation.

Given this evidence, the jury could have reasonably determined that defendant assaulted the victim by strangulation or suffocation. Indeed, defendant harmfully, forcefully, or violently touched the victim by pushing her against a wall and squeezing her neck on two separate occasions. The victim testified that she experienced visual disturbances and believed that she was going to lose consciousness. Furthermore, it may be inferred from the evidence that defendant intentionally impeded the victim's normal breathing or circulation of blood by applying pressure to her throat or neck. The victim testified that defendant stated that he was going to kill her while defendant was squeezing her neck. Moreover, the fact that defendant squeezed the victim's neck two separate times could lead a reasonable juror to believe that defendant was intentionally impeding the victim's normal breathing or circulation of blood. Finally, although the EMS report indicated that the victim's neck was unremarkable for traumatic injury, "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Anderson*, 322 Mich App 622, 632; 912 NW2d 607 (2018). Thus, based on our review of the evidence presented at trial, the jury could have reasonably determined that defendant assaulted the victim by strangulation or suffocation despite the EMS report.

In sum, we conclude that the prosecution presented evidence sufficient to establish beyond a reasonable doubt that defendant assaulted the victim by strangulation or suffocation, and therefore defendant's claim of insufficient evidence must fail.

III. SENTENCING

Defendant also argues on appeal that he is entitled to resentencing because his sentence constituted an unreasonable upwards departure from the minimum sentencing guidelines range. Again, we disagree.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017) (citation omitted). An abuse of discretion occurs when the trial court fails to adhere to the principle of proportionality by imposing a sentence that is not "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 474 (citation and quotation marks omitted).

In *Lockridge*, the Michigan Supreme Court held that the sentencing guidelines are advisory only, and "[a] sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Lockridge*, 498 Mich at 391-392. "A sentence is reasonable

under *Lockridge* if it adheres to the principle of proportionality set forth in *Milbourn*.^[1]” *People v Lampe*, 327 Mich App 104, 126; 933 NW2d 314 (2019) (citation, brackets, and quotation marks omitted). The principle of proportionality set forth in *Milbourn* “requires the sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *Id.* (citation and quotation marks omitted). Under this principle, “the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines’ recommended range.” *People v Dixon-Bey*, 321 Mich App 490, 521; 909 NW2d 458 (2017) (citation and quotation marks omitted). Factors that may be considered by a trial court under the proportionality standard include, but are not limited to:

(1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant’s misconduct while in custody, the defendant’s expressions of remorse, and the defendant’s potential for rehabilitation. [*Lampe*, 327 Mich App at 126 (citation omitted).]

When sentencing a defendant, “a trial court must justify the out-of-guidelines sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been.” *Id.* at 126-127 (citation, brackets, and quotation marks omitted).

Defendant’s minimum sentencing guidelines range for the assault by strangulation or suffocation conviction was 29 to 114 months’ imprisonment. The trial court sentenced defendant, as a fourth-offense habitual offender, to a minimum term of 144 months’ imprisonment, an upward departure of 30 months from the minimum sentencing guidelines range. In doing so, the trial court noted that defendant had prior felony convictions and was on parole at the time of the offense. The trial court also stated that an upward departure was reasonable in light of the following circumstances: (1) defendant strangled the victim twice, (2) the victim’s children were sleeping in the home when defendant strangled the victim, (3) the altercation was not an isolated incident, rather, it occurred over the course of several minutes, and (4) although the victim did not require medical treatment, she suffered psychological and physical harm not otherwise considered by the guidelines.

On appeal, defendant argues that his sentence was unreasonable because the trial court relied upon several factors to justify the upward departure that were already contemplated when the trial court assessed points for the offense variables (OVs). We disagree with defendant’s assertions, and we will address each in turn.

Defendant first argues that the trial court erroneously relied upon the victim’s psychological injury to justify the upward departure because the victim’s psychological injury was already contemplated when the trial court assessed 0 points for OV 4. Under MCL 777.34(1)(c), 0 points should be assessed for OV 4 if “[n]o serious psychological injury requiring professional

¹ *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), abrogation recognized by *Steanhouse*, 500 Mich at 459-460.

treatment occurred to a victim.” In the instant matter, the trial court justified the upward departure, in part, by stating that the victim suffered psychological harm. In doing so, the trial court acknowledged that the victim did not require professional treatment for psychological harm and therefore OV 4 was properly scored at zero. However, because the victim did suffer psychological harm but did not require professional treatment, this was a factor inadequately considered by the guidelines. Therefore, it was properly considered by the trial court when deciding to upwardly depart.

Defendant also argues that the trial court erroneously relied upon the presence of the victim’s children to justify the upward departure because the number of potential victims was already contemplated when the trial court assessed 0 points for OV 9. Under MCL 777.39(1)(c), 10 points should be assessed for OV 9 if there were two to nine victims placed in danger of physical injury or death. Where the victim’s children were in the home during the assault, but were not in immediate danger or physical injury or death, the trial court assessed 0 points for OV 9. However, the trial court properly determined that the fact that defendant would commit a violent assault on the victim while her children were in the home exacerbated the seriousness of the offense and spoke directly to the circumstances surrounding the offense and the offender.

Next, defendant argues that the trial court erroneously relied upon the seriousness of the physical abuse to justify the upward departure where aggravated physical abuse was already contemplated when the trial court assessed 0 points for OV 7. Under MCL 777.37(1)(b), 0 points should be assessed for OV 7 if “[n]o victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” Here, the trial court justified the upward departure by stating that the altercation was not an isolated incident, rather, it occurred over the course of several minutes, and defendant strangled the victim twice. Although the assault did not rise to the level of sadism, torture, excessive brutality, or conduct otherwise designed to substantially increase the victim’s fear and anxiety as contemplated by OV 7, the victim still sustained documented physical injuries. Indeed, defendant strangled the victim not once, but twice, to the point where the victim suffered visual disturbances and was audibly struggling on the 911 call. The trial court did not err by relying on the seriousness of the physical abuse to justify its upward departure from the minimum sentencing guidelines range.

Finally, defendant argues that the trial court erroneously relied upon a contemporaneous felonious act to justify the upward departure because the fact that defendant strangled the victim on two separate occasions was already contemplated when the trial court assessed 0 points for OV 12. Under MCL 777.42(1)(b), 10 points should be assessed for OV 12 if “[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed.” Additionally, under MCL 777.42(1)(g), 0 points should be assessed for OV 12 if “[n]o contemporaneous felonious criminal acts were committed.” A felonious criminal act is contemporaneous if “the act occurred within 24 hours of the sentencing offense[.]” and “the act has not and will not result in a separate conviction.” MCL 777.42(2)(a)(i) and (ii). Here, despite the fact that defendant strangled the victim twice, the trial court did not conclude that defendant committed two contemporaneous felonious acts. Indeed, the trial court assessed 0 points for OV 12. In deciding to upwardly depart from the minimum sentencing guidelines range, the trial court determined that the prolonged altercation including multiple acts of violence exacerbated the seriousness of the offense, which was inadequately considered by the guidelines.

In light of the foregoing, we conclude that in deciding to impose a minimum sentence that upwardly departed from the minimum sentencing guidelines range, the trial court properly considered the circumstances surrounding the offense and the offender, as well as factors not adequately considered by the sentencing guidelines, and that the departure sentence imposed by the trial court was proportionate and reasonable.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro